U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 August 2004

BALCA Case No.: 2003-INA-167
ETA Case No.: P2000-CA-09509503

In the Matter of:

TENDER LOVING CARE,
Employer,

on behalf of

ROSA MARIA VICTORIANO,
Alien.

Appearance: Evelyn Sineneng-Smith, Immigration Consultant
San Jose, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On May 26, 2000, the Employer filed an application for labor certification on behalf of the Alien to fill the position of "Caregiver/Household Domestic Worker." The job requirements for the position were four years of high school and three months of experience. The position required that the caregiver live at the Employer's facility, a residential home for the elderly. (AF 81).

On November 4, 2002, the CO issued a Notice of Findings ("NOF") proposing to deny certification. (AF 75-79). The CO questioned whether there was a bona fide job opportunity, noting that there was not enough room in the Employer's residential facility to house both patients and nurse assistants. Observing that the Employer's residential facility consisted of ten rooms and that the Employer intended to hire six nurse assistants, the CO questioned whether there was sufficient room for the patients. The CO instructed the Employer to submit documentation of the Employer's ability to provide permanent, full-time employment to a U.S. worker, as well as a copy of the Employer's business/care home license, and the Employer's state and federal business income and tax returns. The CO found that the position which the Employer sought to fill was accurately characterized as "Nurse Assistant" and was therefore on the list of non-certifiable occupations. Accordingly, the CO instructed that the Employer could submit a Schedule B waiver with supporting documentation from the local job service office showing that the Employer "had a 'suppressed' job order on file." Finally, the NOF indicated that the Alien lacked the minimum requirements for the position because she did not have three months of experience in each of the job duties described in the application.[1] The CO instructed the Employer either to submit an amended ETA 750A or an amended ETA 750B, or to document the infeasibility of hiring workers with less experience than that required by the job offer.

[1] Although the CO listed several other deficiencies in the Employer's application, those deficiencies were not grounds discussed in the Final Determination denying certification.

The Employer filed a rebuttal on January 8, 2003. (AF 10-74). The Employer submitted tax forms and its business license, as requested. The Employer stated that it was "now engaged in providing caregivers to take care of the elderly in their own private homes." The Employer also sought to amend the ETA 750A so that the job description for the position read "assist 1 frail elderly," instead of "assist 6 frail elderly." The Employer stated that it had complied with the waiver requirements of 20 C.F.R. § 656.23(d)(2), explaining that an employee of the EDD informed the Employer that all requests for labor certifications were processed as "suppressed"[2] job orders. In addition, the Employer provided the name and phone number of the EDD employee. The Employer submitted documentary evidence of the results from the job order, which indicated that there were no referrals as a result of the order. (AF 58, 102). Finally, the Employer submitted an updated statement of the Alien's work experience to rebut the CO's contention that the Alien did not possess the necessary qualifications. (AF 61-62). The statement listed the Alien's past experience, which included taking care of a frail, elderly resident and assisting with daily living activities such as "hair/mouth/bowel/skin care," changing diapers, and ambulating. (AF 61).

The CO issued a Final Determination ("FD") denying labor certification on February 5, 2003, finding that the Employer failed to adequately document the existence of a bona fide job opportunity. (AF 8-9). The CO reasoned that the Employer sought to prove it had sufficient rooms for six nurse assistants by stating that it owned several other facilities with available rooms. However, observing that the Employer did not submit copies of its licenses for these other facilities, the CO found the Employer's explanation insufficient. The CO also based his denial on a finding that the Employer's job order did not qualify the petition for waiver from Schedule B. (AF 9). The CO stated that while the job service currently runs all job orders as "suppressed," at the time the Employer's job order was listed, it was not standard practice to do so. Thus, the CO concluded that the Employer's job order had been run unsuppressed. Finally, the CO found that the Employer did not demonstrate that the Alien had the necessary qualifications for the

[2] In the FD, the CO defined a suppressed job order as one "with accounting for responses" and an unsuppressed job order as one "without any way to account for responses from available US workers." (AF 9).

position, noting that there was no proof that the Alien had experience with "Alzheimer's disease, diabetic, hypertension, cancer, stroke victims, Kidney disease, incontinent, wheel-chair bound, disabled, blind, deaf." The CO also claimed that the Alien did not have experience with personal hygiene care, such as cleaning the body and emptying urine bags, and had not demonstrated experience in heavy lifting, as required for wheelchair bound and patients with walkers and canes. (AF 9).

On March 10, 2003, the Employer requested review of the denial on the grounds that it had submitted additional evidence to the CO on March 10, 2003. The Employer also stated that, on January 8, 2003 and February 28, 2003, it indicated its willingness to retest the labor market and to re-advertise the job offer.

DISCUSSION

Bona Fide Job Opportunity

An employer petitioning for permanent alien employment certification must demonstrate that the job opportunity offered to the alien has been and is clearly open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). A totality of the circumstances test is used to determine whether a job opportunity is bona fide. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*). The employer bears the burden of showing that the job opportunity is bona fide. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988)(*en banc*).

The Employer has not adequately demonstrated that the job opportunity is bona fide. The CO denied labor certification in part because he found that the Employer failed to demonstrate that there was sufficient room in the Employer's facility for six live-in nurse assistants and six patients. He reasoned that although the Employer stated that it had additional facilities with rooms available for employees, no licenses for those other facilities were submitted. Although it is unclear the exact number of caregivers the

Employer is hiring and expecting to house in the facility,[3] the Employer initially stated that caregivers were to reside in the facility with the patients. In rebuttal, the Employer stated that its business was currently engaged in caring for elderly patients *in their own homes*. This raises an issue as to the live-in requirement; the position was advertised and petitioned for with the requirement to live-in the facility. There is a question as to where the worker will reside, given that the patients no longer reside at the facility. The bona fide nature of the position is questionable, as the circumstances and requirements of the job have changed since the recruitment. The Employer failed to demonstrate that there is a bona fide job opportunity which is clearly open to U.S. workers.

Schedule B Waiver

When an occupation is listed on Schedule B, the Director has determined that U.S. workers are generally available to fill such positions. 20 C.F.R. § 656.23(a). However, an employer seeking permanent labor certification for a Schedule B occupation may petition the CO for a waiver on behalf of the alien for whom it seeks certification. 20 C.F.R. § 656.23(d).

The CO based his denial of certification in part on a finding that the Employer's petition for waiver from Schedule B was inadequate. In the NOF, the CO required Employer to provide "documentary verification from the local job service office that you have had a 'suppressed' job order on file with the local office." (AF 77). In its rebuttal, the Employer indicated that it had contacted the local job service and was informed that all job orders are run suppressed. The Employer listed the name and phone number of the staff person with whom the Employer spoke and submitted the final documentation notice from the local job service. The CO agreed that the job service now runs all job orders suppressed, but noted that at the time of the order, this policy was not in effect.

The Employer made an assertion that the job order was run suppressed. The Employer provided a contact person at the state agency, but did not provide any

[3] The CO stated that the Employer was hiring six caregivers; however, the advertisement for the position indicated that the Employer was hiring four caregivers.

documentation to confirm that the order had been run suppressed. Generally, bare assertions without supporting documentation are not sufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). The Employer did not provide a statement from the job service confirming the status of this order and did not proffer any explanation as to why this was not provided. Because it is the employer's burden of proof to create a record upon which certification can be granted, simply giving the name and number of a contact at the state agency is insufficient to document the Employer's assertion. *See* 20 C.F.R. §§ 656.2(b), 656.25(e)

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five doublespaced typed pages. Responses, if any, must be filed

within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.